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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Florida

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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INTEREST OF N.L.A.D.A. AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (N.L.A.D.A.) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The Association also includes four thousand

individual members, most of whom are private practioners.

(2) Members in N.L.A.D.A. include both public defenders and private practioners in every state in which the death penalty might be imposed. Many persons represented by members of the Association face this possible penalty and, indeed, have been sentenced to die. The N.L.A.D.A. has a vital interest in assuring that persons sentenced to death following this Court's mandates of July 2, 1976, are guaranteed scrupulous protection of their constitutional rights prior to the execution of such ultimate judgment.

(3) The issues involved in this case concern not only the possible imposition of the death penalty, but also the *ex post facto* application of other types of sentencing alternatives of interest to N.L.A.D.A. members.

(4) N.L.A.D.A. has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

1.

The issue before the Court in this petition is whether the change in Florida law between the date of the offense and the date of petitioner's sentencing denied the petitioner such substantial rights as to amount to an *ex post facto* law. It is the position of the National Legal Aid and Defender Association that the statutory modification was such a substantive change

because the result under the previous law was that the petitioner could not have been executed, while he was actually sentenced to die under the law in effect at the time of the sentencing. Moreover, the petitioner would have a number of additional rights in having the jury determine his sentence rather than the trial court. These rights include having persons who might be generally opposed to the death penalty on the jury, freedom from political or other extraneous pressures, and the ability to argue more broadly than allowed under current law.

2.

The imposition of the death penalty upon this petitioner would constitute a denial of equal protection of law because the petitioner has been placed in a class in which his life or death depends on the date of his trial. This is an irrational basis for the imposition of the death penalty and is contrary to the intention of this Court to end the "freakish" imposition of the death penalty.

ARGUMENT

I. Any Statutory Modification Which Results In A Death Sentence Being Imposed, Which Would Have Not Been Possible Under The Law In Effect At The Time Of The Act, Is *Per Se* The Application Of An *Ex Post Facto* Statute.

A. The narrow issue is whether the change in procedure for imposing the death penalty is "procedural" or "substantive."

In order to understand the issue raised in this case, several basic concepts must be restated. First, a statute which increases the penalty for an act beyond that which was provided at the time of the act is an *ex post facto* law, *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325-326 (1867); *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 377-378 (1867); and *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87, 137 (1810). Thus, it is clear that had the petitioner (hereinafter defendant) committed a crime for which the death penalty was not possible at the time of the act, the subsequent adoption of such a penalty for the offense would not and could not, constitutionally, apply to the petitioner, *White v. Brown,* 468 F. 2d 301, 303 (9th Cir. 1972). It is also clear, as will be developed below, that some changes in the criminal law, not changing the possible sentence, so alter the defendant's situation as to constitute an *ex post facto* law.

On the other hand, a second usual rule is that changes in criminal *procedure* after the date of the criminal act are not treated as *ex post facto, Frisby v. United States,* 38 App. D.C. 22, 25 (1912); *Beazell v. Ohio,* 269 U.S. 167, 171 (1925).

In the instant matter, the defendant was sentenced pursuant to a statute which was not in effect at the time of the act. Under the statute which was effective on the date of the crime, the defendant could not have been sentenced to death because of the jury's recommendation of mercy. Under the statute in effect at the time of sentencing the defendant could be, and was, sentenced to die by the court, notwithstanding the jury's recommendation of mercy. For the reasons which follow, it is the position of the National Legal Aid and Defender Association that such a change in statutory scheme for the imposition of the death penalty was a substantive change, manifestly effecting the rights of this defendant, and as such must be treated as an *ex post facto* law prohibited by Article I, section 10, of the United States Constitution.

B. The change in statutory scheme deprived the defendant of substantial rights and as such is an ex post facto law.

If the change in statutory scheme for the imposition of death in Florida is found to be substantive, rather than procedural, the sentence imposed in this case is unconstitutional as being *ex post facto.* The answer to the question of whether the statutory change is substantive or procedural depends upon its effect upon

the defendant. This Court made that clear as long ago as *Kring v. Missouri*, 107 U.S. 221, 228-229 (1882), in stating that a statute is *ex post facto* when it "alters the situation of a party to his disadvantage ...[or] ... takes away or impairs the defense." In *Kring*, this Court invalidated a state constitutional provision which had been interpreted to abrogate the law existing at the time of the offense, that made conviciton of the lesser-included offense of second degree murder an acquittal of first degree murder when the defendant was tried on an indictment charging the greater offense.

In *United States v. Henson*, 486 F. 2d 1292, 1304-1308 (D.C. Cir. 1973), the Court of Appeals examined these same questions most carefully and decided, *en banc*, that a statutory amendment that mandated the admission into evidence of the defendant's prior criminal record should he testify, when the law at the time of the act granted the court discretion to admit or reject such evidence, was an *ex post facto* law. The appellate court found that had the court exercised its discretion to exclude such testimony from evidence, the new statute would have prejudiced the defendant in two ways. First, because the admission of the prior record diminished his credibility, and, secondly, because such statutory change may have deterred the defendant from testifying on his own behalf.

1. The difference in penalty possible under the old and present law is sufficient in itself to meet the test for an *ex post facto* statute.

One can hardly imagine a statutory change which more significantly changes the defendant's situation than that which would have allowed him to live under the old law, but provides that he be put to death under the modified law. In *Kring*, the Court indicated that a statute that takes away "any substantial right" from the defendant is *ex post facto*, at 107 U.S. 228-229. Can it be argued that a statute which deprives the defendant of his life has not deprived him of a substantial right? Obviously not.

Under all of the cases decided by this Court, a statute is *ex post facto* if it deprives a defendant of a substantial right. It is the fundamental position of the National Legal Aid and Defender Association that any statutory modification which results in a person being sentenced to death, when such a penalty would not have been possible under prior law, is *per se ex post facto* under the "substantial right" test adopted by this Court, whether the change was in the substantive law, sentencing provisions, evidentiary rules, or rules of

procedure./[1] Such changes are substantive in relation to the *ex post facto* question.

> 2. The defendant has substantially more rights when the jury makes a binding determination that the death penalty not be imposed than when the trial court can sentence to death notwithstanding the jury's recommendation of mercy.

Even if the Court is unwilling to adopt the foregoing reasoning, it is submitted that the defendant was denied a substantial right by having the judge or court make a discretionary determination rather than

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/[1]This position is consistent with the rule followed by this Court in determining whether to follow the federal procedural rules or the state's substantive rules in diversity actions brought in federal court. This Court has found a state's statute of limitations to be substantive law, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), *Guaranty Trust v. York*, 326 U.S. 99 (1945); a state's *res judicata* principles to be substantive, *Angel v. Bullington*, 330 U.S. 183 (1947); a state's rules regarding the exclusion of non-qualified corporations from litigation to be substantive, and not procedural provisions, *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); as well as a state burden of proof, *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939); contributory negligence, *Palmer v. Hoffman*, 318 U.S. 109 (1943); conflict of laws, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); and accrual of the cause of action, *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940).

These cases all underline the proposition that it is the rights created by the rule, not its title or nature which governs whether it is considered substantive or procedural.

have the recommendation of the majority of jurors binding upon the sentencing court.

A jury in a death case expresses the "conscience of the community on the ultimate question of life or death," *Witherspoon v. State of Illinois*, 391 U.S. 510, 519 (1968). Indeed, for that very reason, in *Witherspoon* this Court ruled that persons with general religious or conscientious scruples against the imposition of the death penalty could not be excluded from a jury in a capital case. It is entirely possible that a jury, representing a cross section of the community, would recommend mercy, while the individual judge would sentence the defendant to death. Indeed, that very thing happened here. In *Witherspoon*, and its progeny,/[2] this Court has made apparent the importance of the jury determination. It is difficult to believe that the substitution of a discretionary determination by a single judge for a decision made by the majority of a jury, representing the cross section of the community, including those persons with general conscientious objections to the death penalty, would not be a substantial loss to a criminal defendant. The change is not only a change in procedure, it is a substantive change as well./[3]

/[2]*Boulden v. Holman*, 394 U.S. 478 (1969); *Maxwell v. Bishop*, 398 U.S. 262 (1970); *Wigglesworth v. Ohio*, 403 U.S. 947 (1971); *Davis v. Georgia*, — U.S. — (20 Cr.L. 4092, 12/3/76).

/[3]In *Woodson v. North Carolina*, — U.S. —, 96 Sup. Ct. 2978, 2987 fn. 31 (1976) (plurality opinion per J. Stewart), it was pointed out that a jury imposes death in less than 20% of the cases.

Indeed, the Georgia Supreme Court determined that a statute which changed the law from jury to judicial sentencing was *ex post facto, Camp v. State,* 187 Ga. 76, 200 S.E. 126 (1938), and *Hunt v. State,* 187 Ga. 73, 199 S.E. 801 (1938). Similarly, the United States Court of Appeals for the Fifth Circuit upheld as procedural a change which pertained only to the *time* a defendant makes his decision to elect jury, as opposed to judicial, sentencing, *Donald v. Jones,* 445 F. 2d 601 (5th Cir. 1971), while the Court of Appeals for the Seventh Circuit held that a statute changing jury sentencing to judicial sentencing was not *ex post facto* because of a "savings clause" which allowed only those sections of the new statute which mitigated punishment to apply to acts committed before the effective date of the change, *James v. Twomey,* 466 F. 2d 718, 721 (7th Cir. 1972). All of these cases support the proposition that a change from jury to judicial sentencing is substantive and *ex post facto* on the facts of the present case.

It would also be to ignore the obvious not to recognize the fact that many times elected trial court judges are placed under considerable pressure from the electorate, media, and community in general to impose the death penalty whether those feelings are representative of the true community or not. A judge who has to run on his record in a community in which crime is a serious problem would certainly be more inclined to impose death than a jury of citizens who are able to grant the defendant the individualized justice this Court's decision in *Woodson v. North Carolina, supra,* demands.

In the various death penalty cases decided by this Court, it appears that a primary concern has been the freakish or arbitrary application and imposition of capital punishment by both judges and juries. The statutes upheld by this Court subsequent to *Furman v. Georgia,* 408 U.S. 238 (1972), have overcome these problems by providing criteria, standards, and careful judicial review. While no one would differ with the proposition that a judge or jury should be carefully guided by articulated criteria and standards when considering the imposition of the death penalty, the fact is that in a given case the lack of standards under earlier statutes might well benefit a defendant. Thus, while the statute in effect on the date of the murder may well have been unconstitutional, that does not mean that the defendant might not have had rights and privileges under that statute that were restricted under the newer, valid, statute. While the defendant may have no constitutional right to a binding jury verdict on sentencing, the fact is that in a given situation, and specifically in the instant matter, the statutory right to a binding jury verdict of mercy creates important and substantial rights which accrue to the benefit of this defendant. For this reason, the National Legal Aid and Defender Association submits that the statutory modification of the method for imposing the death penalty in Florida removed a substantial right from this defendant and for that reason his sentencing to death under a statute enacted subsequent to the offense was unconstitutional as being an *ex post facto* law.

II. The Imposition Of The Death Penalty In The Instant Case Is A Denial Of Equal Protection Of Law.

There is little that can be added to petitioner's argument in relation to the assertion that the imposition of death upon Dobbert amounts to a denial of equal protection of law. Indeed, the Florida Supreme Court acknowledged as much when, in *In re Baker,* 267 So.2d 331 (1972), it ruled that all pre-*Furman* defendants sentenced to death would be immediately resentenced to life imprisonment with the possibility of parole to avoid resentencing under a new statute which required a no-parole life term./[4] Most recently, in *Rudolph Valentine Lee v. State of Florida,* — So.2d — (1976) (case no. 47,690, decided December 9, 1976), the Court found that the defendant was sentenced to death only because his attorney had filed a motion to reduce sentence, which was granted thereby allowing the state to appeal, and resulting in the imposition of death after the reversal on appeal. Had the defendant done nothing, his sentence would have automatically been reduced to life imprisonment. The Court found this to be an unfair result saying that "... the question of whether a person should live or

/[4]The Florida court said: "There appears to be no reason why the remaining members of the class need be treated differently [than those whose sentences had already been modified]. To do so would create a class statutorily denied parole, while facing life terms in prison. The uniqueness of this position would foster litigation attacking both the facial validity of the statute ... and its selective application to an indistinguishable few — a seeming denial of equal protection," at 334-335.

be put to death by the State should [not] be determined by the legal procedures of when his request for reduction of sentence was made" (slip opinion, page 3).

Yet, this defendant is being placed in a class by himself, or in which there are very few others. Had this defendant been tried and convicted earlier, he could not have been sentenced to death. The National Legal Aid and Defender Association submits that the question of whether a person should live or be put to death should not be determined by the date of trial any more than by the date some procedural motion is filed.

In the July 2, 1976 decisions of this Court on the death penalty, the single thread running through all of the decisions is that the imposition of this penalty should not be arbitrary or capricious. Justice Stewart, concurring in *Furman,* called the imposition of death under pre-*Furman* statutes "wanton and freakish," at 408 U.S. 309-310. "Freakish" is indeed the appropriate word to describe the imposition of the death penalty upon Ernest John Dobbert.

Dobbert is perhaps the only person who could not have been executed under the previous law who has now been sentenced to death notwithstanding the fact that the crime took place before the effective date of the statute. Considering what the defendant has at stake in these proceedings, one could hardly argue that the situation in which the defendant finds himself does not deny him a substantial right, *cf. Braley v. Gladden,* 403 F. 2d 858, 861 (9th Cir. 1968); *James v. Twomey, supra,* at 466 F.2d 721.

It is simply not rational to have the ultimate life or death of this defendant hinge on the date of his trial. Allowing the defendant to be put to death under these circumstances when ten members of the jury and one member of the Florida Supreme Court believed that the facts do not warrant such a punishment would be inconsistent with the great solicitude the members of this Court have expressed for avoiding the arbitrary, capricious, and "freakish" imposition of the death penalty.

CONCLUSION

For the reasons set forth herein, it is the position of the National Legal Aid and Defender Association that the imposition of the death penalty upon Ernest John Dobbert was unconstitutional as being *ex post facto* as well as a denial of equal protection of law. Thus, the N.L.A.D.A. joins the petitioner in urging this Court to reverse the judgment of the Florida Supreme Court and to remand this matter with directions to reduce the sentence imposed herein from death to life.

Respectfully submitted,

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